

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of:

Determination of Rates and Terms for
Preexisting Subscription Services and
Satellite Digital Audio Radio Services

Docket No. 2011-1
CRB PSS/Satellite II

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**SOUNDEXCHANGE'S MOTION TO STRIKE THE PLAY SHARE ANALYSIS FROM
THE REBUTTAL TESTIMONY OF RONALD H. GERTZ, DAVID FREAR, AND
ROGER NOLL**

I. INTRODUCTION

During the direct case hearing, Judge Roberts asked Sirius XM's witnesses how many of the top 20 or 25 labels had signed direct licenses. In rebuttal, Mr. Gertz has sponsored testimony in response to that question that purports to analyze Sirius XM's April 2012 play data and rank record labels based on the number of plays of their recordings (hereinafter the "Play Share Analysis").

SoundExchange respectfully moves this Court to strike the Play Share Analysis from the written rebuttal testimony of Sirius XM witness Ronald H. Gertz and any reference to it from the written rebuttal testimony of Sirius XM witnesses David Frear and Roger Noll. Specifically, SoundExchange moves to strike (1) the Play Share Analysis that appears in paragraphs 6 through 9 and Table 1 of Mr. Gertz's written rebuttal testimony, including footnotes 5 through 8 ("Gertz WRT"); (2) the references to it in paragraphs 7 through 10 of Mr. Frear's written rebuttal testimony ("Frear WRT"); and (3) the first full paragraph of page 33 to the last full paragraph of page 34, as well as Tables 2 and 3 of Dr. Noll's written rebuttal testimony ("Noll WRT").

The testimony related to the Play Share Analysis should be struck because is riddled with errors and thus incorrect and unreliable. Specifically, in instances where a direct license label has released an album containing a recording of a song (regardless of whether that label even owns the master to that recording), MRI has credited that label with ownership of every other recording of that song by the same artist, even where it is plainly evident that the label has no rights in those other recordings. Mr. Gertz's analysis has thus erroneously credited direct license labels with ownership of thousands of sound recordings that are actually owned by other record companies. This error appears to be widespread and vastly inflates the asserted market share of direct license labels by erroneously crediting these labels with ownership of all versions of many popular recordings. This error explains why MRI's original analysis (SoundExchange Trial Exhibit 20) showed that only 2 of the top 25 labels (according to plays during the course of a year on Sirius XM) and only 7 of the top 100 were direct license labels.

Sirius XM has offered MRI's Mr. Gertz as the sponsoring witness for the Play Share Analysis, which was purportedly conducted at his direction. However, at his deposition, he was unable to explain the rampant errors. Mr. Gertz should not be permitted to sponsor unreliable evidence in the record, especially given his inability to address the errors.¹

I. BACKGROUND

A. The Play Share Analysis

The centerpiece of Mr. Gertz's rebuttal testimony (and Sirius rebuttal XM's case) is the Play Share Analysis – a ranking and analysis of directly licensed and non-directly licensed labels. *See* Gertz WRT at ¶¶ 6-9, Table 1. The Play Share Analysis purports to respond to the

¹ SoundExchange is filing this motion as promptly as possible after having deposed Mr. Gertz on August 3, 2012, and having received an extremely large volume of relevant data from Sirius XM about a week ago. Review of the data is time-consuming.

request by Judge Roberts during the direct phase that Sirius XM “take the top 20 or 25 labels, again, according to your playing, not—not any other standard, and you can tell us how many of those that you have.” 6/7/2012 Tr. 686:19-687:1 (Frear); *see* Gertz WRT at ¶ 6.

Mr. Gertz took the lead in responding to Judge Roberts’ request by having staff at MRI do an analysis. *See* Gertz WRT at ¶ 6 (“In response to Judge Roberts’s request . . . I instructed my staff to identify the independent record companies played most frequently on Sirius XM music channels during April 2012 (the most recent month for which we have processed the data) and to identify which of those labels have executed direct licenses.”). At his deposition, Mr. Gertz was unable to explain the analysis or its rampant errors. *See* Gertz Deposition (Aug. 3, 2012) (attached hereto as Exhibit A).

According to an interrogatory response submitted by Sirius XM, the analysis was conducted as follows. MRI first obtained a playlist for April 2012 from Sirius XM. *See* Sirius XM’s Responses and Objections to SoundExchange’s Rebuttal Interrogatories, at 8 (“SXM Interrog. Resp.”) (attached hereto as Exhibit B). Next, “MRI personnel wrote software code to compare the April 2012 playlist against MRI’s database of Sirius XM direct licensor metadata.” *Id.* at 9. The purpose of this comparison was to identify the plays covered by a direct license. *Id.* Then, MRI personnel “engaged in manual research efforts to clarify ambiguous label information,” among other things. *Id.* at 9-10. Based on this work, “the MRI system then tallied the number of April 2012 plays associated with reach record company,” and the number of each label’s plays was divided by the total plays on the playlist “across all services” to determine each label’s percentage share of the playlist. *Id.* at 10. Although Sirius XM does not pay direct license labels for plays of pre-1972 recordings, such plays were included in these calculations. *Id.*

B. MRI's "Cleaning" of Sirius XM's Playlist to Improperly Credit Direct License Labels with Ownership of More Recordings.

Critically, at some point in this process (though it is not expressly mentioned in the interrogatory response), MRI "cleaned" the label information in Sirius XM's playlist. SoundExchange only learned of this "cleaning" of the data when reviewing data produced by Sirius XM in discovery – the original playlist files listed "label" information for recordings, but Sirius XM also produced altered playlist files that listed "cleaned_label" information for the very same recordings. The "cleaned" files reflect changes that MRI made to the copyright ownership. *See* Ex. A, Gertz Dep. at 72-73. Specifically, for plays of numerous recordings where the ownership was originally credited to non-direct license labels (typically the major labels), MRI re-assigned the copyright ownership to direct license labels. According to Mr. Gertz, [REDACTED]

[REDACTED] *Id.* at 73

The "cleaned" data was used to calculate the direct license labels' market share (defined as plays on Sirius XM). Mr. Gertz has admitted that [REDACTED] [REDACTED]. *See* Ex. A, Gertz Dep. at 72. Nonetheless, based on that data, Mr. Gertz provided a table in his testimony that purports to show the Top 75 labels as calculated from the Play Share Analysis, *see id.* at Table 1, and those results are repeated by both Mr. Frear, and Dr. Noll. *See* Frear WRT at ¶¶ 7-10; Noll WRT at 33-34 & Tables 2-3.

C. The Information Produced by Sirius XM in Discovery

After refusing for weeks to provide the underlying data for the Play Share Analysis in discovery, Sirius XM finally provided three sets of documents necessary to attempt to replicate its study: (1) the "cleaned" version of its April 2012 playlist (produced on July 23); (2) the

original April 2012 playlist (produced on August 1); and (3) the direct license label metadata files (produced on August 1).²

(1) The original April 2012 playlist is the file that Sirius XM provided to MRI to complete the market share analysis. It is a tabular data file containing a list of every transmission on each Sirius XM channel, listing for each transmission (based on Sirius XM's database records) the artist, track title, album title, label name, catalog information, ISRC code, date and time of transmission, duration of transmission, and the channel of transmission.

(2) The "cleaned" version of the playlist lists the identical transmissions from Sirius XM's April 2012 playlist with certain data "cleaned up" by MRI; most notably, the label name column is replaced with a new column entitled "label_cleaned." The Play Share Analysis is based on this "cleaned" data and in particular on this column, which reflects MRI's (fundamentally flawed) attempt to match transmissions with labels.

(3) The metadata files are one of the main sources that MRI used to the match transmissions with direct license labels. These files contain listings of each track (generally including at least artist, track name, and album) for each recording that the direct license label claims to have a right to license. Notably, within certain of these metadata files are clear indicators that labels do not have full ownership rights, such as limited territorial sale/licensing rights (e.g., only the right to license particular tracks in Europe) or only the right to sell/license the full album rather than individual songs.³ MRI appears to have ignored those indicators.

² All of these documents should have been produced on July 2 with Sirius XM's initial disclosures.

³ This type of limited right often happens for songs that appear on compilation albums, where the original copyright owner grants the label a limited right to use a recording only for certain purposes (e.g., to sell on an album) but does not grant the label all rights to sell or license the recording. In those situations, MRI should be ensuring that the rightful owner of the recording is

III. DISCUSSION

A. **The Play Share Analysis is Fatally Flawed.**

Once SoundExchange finally obtained the data from Sirius XM in discovery, it quickly became clear that the MRI study was completely and utterly unreliable. As noted above, SoundExchange identified a major error in the analysis—MRI appears to have systematically credited direct license labels with ownership of any recording that matches the artist and track name of a recording on an album released by a direct license label, regardless of which version of the recording was actually played by Sirius XM and regardless of whether a direct license label is actually the copyright owner.

Because every sound recording is individually copyrighted, there are often many different recordings of a single song, each of which may have a different copyright owner. But MRI's study ignores this basic truth. Instead, it simply assumes that a direct license label owns each and every version of a sound recording with the same artist name and track title. This error systematically inflates the play share of direct-licensed labels and deflates the play share of non-direct licensed labels. As a result, the rank order and the market share that Mr. Gertz and the other witnesses claim for the direct license labels are highly inaccurate.

This error is particularly significant because many of the direct license labels release albums that contain songs for which there are multiple recordings – re-records, compilation albums and live albums of popular songs – and which therefore are affected by MRI's errors. For example, Cleopatra Records specializes in releasing re-recordings of popular songs from older artists. Often these albums and re-recordings are not very popular because audiences prefer the original versions. Sirius XM itself almost always prefers the original versions, as

paid, but as described below, MRI appears to have done the opposite: awarding all versions of any recording appearing on a compilation album to the label releasing the compilation.

evidenced by its playlists, but because the names of the artist and the track title are the same as the original versions, MRI has simply assigned all of the original versions to the direct license labels that own re-records.

Similarly, labels such K-Tel records specialize in compilation albums. These albums compile hit songs that are generally owned by other labels, which grant K-Tel (or other labels) limited license to use those recordings on the compilation albums. MRI, however, has now assigned all versions of those recordings to the direct license compilation labels and away from the actual owners of the recordings, even where the compilation is album is not even played.

In the aggregate, MRI's errors are responsible for a huge percentage of the transmissions that MRI has assigned to direct license labels. Because of the large amount of data involved and because of Sirius XM's delays and refusals in producing documents, it is not possible for SoundExchange to complete a thorough review of every single play on the April 2012 playlist before trial.⁴ However, based on SoundExchange's review to date, it appears that in the range of 1/3 to 1/2 of all transmissions assigned to direct license labels were incorrectly assigned. SoundExchange's review has included comparing the original playlist with the MRI "cleaned" playlist to identify the changes that MRI made.⁵ SoundExchange further compared these playlists against the metadata provided by the direct license labels as well as to publicly available information on the copyright ownership of various sound recordings. Based on this review, it is clear that MRI's matching efforts went terribly wrong. SoundExchange quickly noticed that the "key artists" touted by Sirius XM were rarely among the most played artists for many of the direct license labels. Instead, other famous artists had many more plays but generally only for a

⁴ There were [REDACTED] transmissions listed on Sirius XM's April 2012 playlist.

⁵ Because Sirius XM has marked all of the relevant documents as Restricted under the protective order, SoundExchange's counsel has been unable to share any of these files with employees of SoundExchange or with record labels to verify ownership of particular sound recordings.

handful of songs. When the “cleaned” playlists were compared with the “original” playlists, it became clear that MRI had changed the ownership of many thousands of recordings to direct license labels even where Sirius XM itself had identified those recordings as owned by other non-direct license labels.

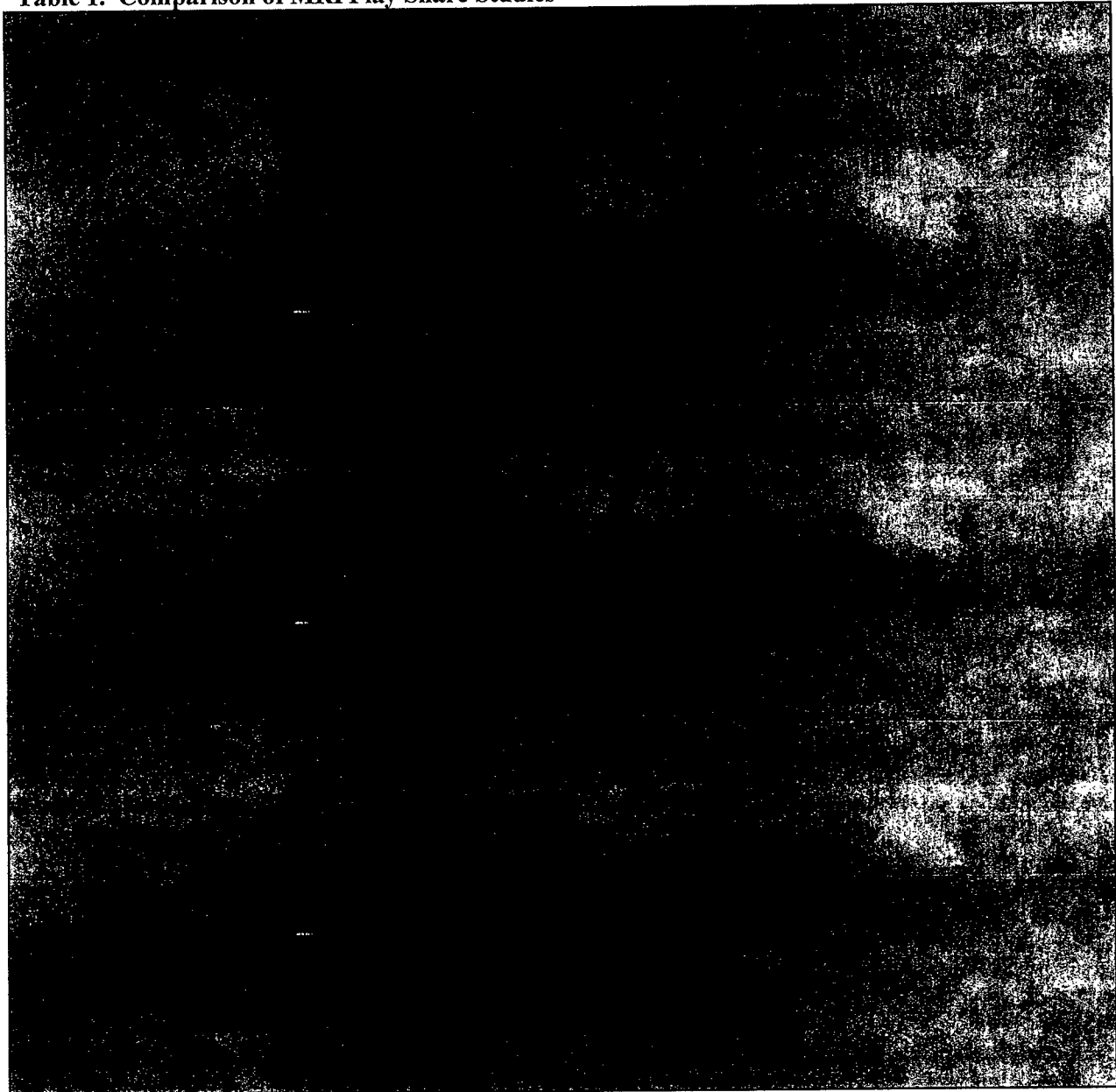
The errors are far too numerous to identify each in this motion. A typical example of MRI’s erroneous matching process is its assignment of 11 popular [REDACTED] songs to E1 Entertainment (a direct license label). In 2005, E1 (through its predecessor Koch Records) released a tribute album “[REDACTED],” which includes cover performances of 11 of [REDACTED]’s greatest hits performed by artists other than [REDACTED]. See Exhibit C (All Music Review). Even though [REDACTED] performed *none* of these recordings (and E1 owns no [REDACTED] recordings according to E1’s own metadata and public sources), MRI erroneously reassigned ownership to E1 for 544 plays of original [REDACTED] recordings of these 11 songs. See Exhibit D (MRI- cleaned playlist); Exhibit E (original playlist); Exhibit F (relevant metadata).

Similarly, MRI erroneously matched all recordings of [REDACTED] [REDACTED].” It appears this error was based on a 2007 album that direct license label [REDACTED] [REDACTED]. According to [REDACTED] own metadata and public records, these are the only two [REDACTED] catalog, neither of which appears on Sirius XM’s April 2012 playlist. Nevertheless, MRI awarded each and every play of the songs [REDACTED] (totaling 219 in

April 2012 alone) to [REDACTED], even though the recordings played by Sirius XM are actually owned by other labels. *See* Exhibit G (MRI- cleaned playlist); Exhibit H (relevant metadata).

In fact, for many direct license labels, the vast majority of plays that MRI assigned to them are incorrect. For example, SoundExchange's counsel manually reviewed each of the plays assigned to Angel Air Records, a small British independent direct license label that owns a collection of mostly live recordings, and could match less than 5% of transmissions to actual recordings claimed by the label through its metadata. *See, e.g.*, SXM_CRB_REB_00020322-29 (Angel Air Records metadata). The evidence makes clear that MRI erroneously credited Angel Air Records with plays of *other* versions of these recordings owned by other labels. This explains why Angel Air Records only had a market share of [REDACTED] (for a label rank of [REDACTED]), in the original market share study that MRI performed before the direct license initiative (SoundExchange Trial Exhibit 20) but now has an increased market share of [REDACTED] (for a label rank of [REDACTED]) in Mr. Gertz's rebuttal testimony.

The table below compares results from MRI's original market share analysis performed before the direct license initiative (SoundExchange Trial Exhibit 20) with the analysis set forth in Table 1 of Mr. Gertz's rebuttal testimony.

Table 1. Comparison of MRI Play Share Studies

Sources: Gertz WRT at 5-6, Table. 1; SoundExchange Trial Exhibit 20.)

Based on MRI's prior analysis, only 2 of the top 25 labels and 7 of the top 100 labels signed direct licenses. In rebuttal, MRI has artificially inflated those numbers by erroneously transferring ownership of thousands of recordings to these labels that they do not own.

The examples below establish beyond a doubt that MRI's "cleaning" of the data introduced pervasive errors into the copyright ownership claimed for the direct license labels. These example are unfortunately just the tip of the iceberg as hundreds of additional artists and thousands of recordings were affected by MRI's erroneous matching methodology. The data showing these errors is voluminous, but for some of the examples, SoundExchange has included the relevant portions of the cleaned and original April 2012 playlists and the relevant portions of direct license label metadata as exhibits. All of these documents were obtained from Sirius XM in discovery as back up to its Play Share Analysis.⁶

E1 Entertainment. MRI has erroneously matched many thousands of plays based on E1 Entertainment's ownership of tribute albums, compilations albums, and live albums. Below is just a sampling of the errors, covering only 7 artists who alone account for 2000 erroneously matched plays (roughly 15% of the tracks assigned to E1 in the playlist provided by Sirius XM).

- [REDACTED]: 528 plays erroneously reassigned from the original label owners to E1 based on tracks of the same title on the live album "[REDACTED]," which never appears on Sirius XM's April 2012 playlist.
- [REDACTED]: 180 plays erroneously reassigned from the original label owners to E1 based on tracks of the same title on the live album "[REDACTED]," which never appears on Sirius XM's April 2012 playlist.
- [REDACTED]: 251 plays erroneously reassigned from the original label owners to E1 based on tracks of the same title on the live album "[REDACTED]," which never appears on Sirius XM's April 2012 playlist.
- [REDACTED]: 244 plays erroneously reassigned from the original label owners to E1 based on tracks of the same title on the live albums "[REDACTED]" and "[REDACTED]," neither of which appear on Sirius XM's April 2012 playlist.
- [REDACTED]: 138 plays erroneously reassigned from original label owner to E1 based on tracks of the same title on [REDACTED]," which includes a performance of [REDACTED]." That particular recording

⁶ Given the large volume of data involved, it is not possible to document each and every error made by MRI without submitting thousands of pages of documents to the Court. These examples are illustrative of the errors that pervade MRI's flawed study.

does not appear on Sirius XM's April 2012 playlist, but based on that recording, MRI reassigned ownership to E1 of all versions of the song performed by [REDACTED].

- [REDACTED]: 135 plays erroneously reassigned from the original label owners to E1 based on tracks of the same title on the re-record and compilation albums "[REDACTED]" and "[REDACTED]," neither of which appear on Sirius XM's April 2012 playlist.
- [REDACTED]: 544 plays erroneously reassigned from the original label owners to E1 based on the tribute album "[REDACTED]," which includes cover performances of 11 of [REDACTED]'s greatest hits performed by artists other than [REDACTED].

See Exhibit D (MRI-cleaned playlist); Exhibit E (original playlist); Exhibit F (E1 metadata for these 8 artists). This list is nowhere near exhaustive. Indeed, it is telling that of the 38 "key artists" that Sirius XM has identified for E1, only four appear in the top 50 artists in terms of plays matched by MRI to E1 and only 7 in the top 100 artists. Cumulatively, these top 100 artists account for roughly 75% of E1's plays. But it appears that E1 does not own even the majority of these recordings. Rather, MRI has erroneously assigned recordings for what appears to be 100 or more artists for E1 Entertainment alone, affecting thousands upon thousands of transmissions. This again explains why E1's market share increased from [REDACTED] in the original MRI study to [REDACTED] in the current study. See Table 1, *supra*. Indeed, if MRI were to be believed (which clearly nobody should), E1 would be almost twice as large as the next largest independent label. See Gertz WRT at 5, tbl. 1. While E1 is one of the larger independent labels, it is certainly not the largest. MRI's finding that E1 is significantly larger than every other independent label should have set off alarm bells at MRI that its study was deeply flawed.

[REDACTED]. MRI has similarly erroneously assigned ownership to [REDACTED] for thousands of plays that the label plainly does not own based on re-records, compilations, and live albums released by [REDACTED]. For example, of the three most played [REDACTED] artists according to MRI ([REDACTED]), [REDACTED] does not appear to own *any* of the recordings that MRI has assigned to it. The

recordings from these three artists alone collectively account for roughly 20% of the plays assigned to [REDACTED] on the cleaned April 2012 playlist. Unfortunately, these are not isolated incidents:

- [REDACTED]: 171 plays erroneously reassigned from the original label owners to [REDACTED] based on tracks of the same title on the re-record albums “[REDACTED]” (volumes 1-3), which never appear on Sirius XM’s April 2012 playlist.
- [REDACTED]: 92 plays erroneously reassigned from the original label owner to [REDACTED] based on tracks of the same title on the live album “[REDACTED],” which never appears on Sirius XM’s April 2012 playlist.
- [REDACTED]: 108 plays of Eddie Money’s hit songs “[REDACTED]” erroneously reassigned from the original label owners to [REDACTED] based on a live performance of those songs, which do not appear on Sirius XM’s April 2012 playlist.
- [REDACTED]: 89 plays erroneously reassigned from the original label owner to [REDACTED] based on tracks of the same title on the live album “[REDACTED],” which never appears on Sirius XM’s April 2012 playlist.
- [REDACTED]: 94 plays erroneously reassigned from the original label owner to [REDACTED] based on tracks of the same title on the live album “Live Music,” which never appear on Sirius XM’s April 2012 playlist.
- [REDACTED]: 79 plays erroneously reassigned from the original label owner to [REDACTED] based on tracks of the same title on the live album “[REDACTED],” which never appears on Sirius XM’s April 2012 playlist.
- [REDACTED]: 728 plays erroneously reassigned from the original label owners to [REDACTED] based on tracks of the same title on the re-record three-disc set “[REDACTED]” which never appears on Sirius XM’s April 2012 playlist.
- [REDACTED]: 331 plays erroneously reassigned from the original label owners to [REDACTED] based on tracks of the same title on the live album “[REDACTED],” which never appears on Sirius XM’s April 2012 playlist.
- [REDACTED]: 219 plays erroneously reassigned from the original label owners to [REDACTED] based on tracks of the same title on the live album “[REDACTED],” which never appears on Sirius XM’s April 2012 playlist.

See Exhibit G (MRI-cleaned playlist); Exhibit H ([REDACTED] metadata for these 9 artists).

While MRI erroneously assigned numerous other artists and recordings to [REDACTED], these

nine artists alone account for over 1/3 of all recordings assigned to [REDACTED] by MRI on the “cleaned” playlist.

Milan Records. One the labels whose play share is most impacted by MRI’s erroneous methodology is Milan Records, a label that specializes in movie soundtracks. Milan Records’ movie soundtracks often include hit songs, the masters of which are often owned by other labels. MRI did not account for the fact that Milan Records may not own the masters to these recordings. For example, Milan records released a soundtrack to the film [REDACTED] [REDACTED]. According to Sirius XM’s original April 2012 playlist, Sirius XM played [REDACTED] times, but in each instance, it identified another album and credited another label (or in a few cases, no label at all) with ownership of that track. In the “cleaned” version of the playlist, however, MRI [REDACTED]—including live versions of the song that could not possibly belong to the label. All of these changes by MRI were erroneous. Indeed, a review of the tracks assigned by MRI to Milan Records reveals a litany of hit records on albums issued by non-direct license labels that appear to have been erroneously transferred to Milan Records. These include:

- [REDACTED]: 108 plays erroneously reassigned from the original label owner to Milan Records because the hit song appears on the movie soundtrack for [REDACTED], which never appears on Sirius XM’s April 2012 playlist.
- [REDACTED]: 102 plays erroneously reassigned from the original label owner to Milan Records because the hit song appears on the movie soundtrack for [REDACTED], which never appears on Sirius XM’s April 2012 playlist.

- [REDACTED]: 100 plays erroneously reassigned from the original label owner to Milan Records because the hit song appears on the movie soundtrack for the series [REDACTED], which never appears on Sirius XM's April 2012 playlist.⁷
- [REDACTED]: 60 plays erroneously reassigned from the original label owner to Milan Records because the hit song appears on the movie soundtrack for the movie [REDACTED], which never appears on Sirius XM's April 2012 playlist.
- [REDACTED]: 54 plays erroneously reassigned from the original label owner to Milan Records because the hit song appears on the movie soundtrack for the series [REDACTED], which never appears on Sirius XM's April 2012 playlist
- [REDACTED]: 51 plays erroneously reassigned from the original label owner to Milan Records because the hit song appears on the movie soundtrack for the movie [REDACTED], which never appears on Sirius XM's April 2012 playlist
- [REDACTED]: 45 plays erroneously reassigned from the original label owner to Milan Records because the hit song appears on the movie soundtrack for the series [REDACTED], which never appears on Sirius XM's April 2012 playlist
- [REDACTED]: 40 plays erroneously reassigned from the original label owner to Milan Records because the hit song appears on the movie soundtrack for the movie [REDACTED], which never appears on Sirius XM's April 2012 playlist

See Exhibit I (MRI-cleaned playlist); Exhibit J (original playlist); Exhibit K (Milan metadata for these soundtracks). This list could go on for pages. Based on a review of the plays assigned by MRI to Milan Records, fewer than 10% could even be plausibly owned by Milan. The rest, like the examples above, seem to be hit recordings owned by other labels, a version of which (and not necessarily even the same version) appears on some movie soundtrack released by Milan Records. This explains why the play share for Milan Records increased ten-fold from [REDACTED] in the original MRI study (label rank [REDACTED]) to [REDACTED] in Gertz's testimony (label rank [REDACTED]). See Table 1, *supra*.

⁷ While the original recordings in these examples are most often owned by major labels, some are owned by independent labels that did not sign direct licenses. For example, [REDACTED] is on the album [REDACTED], which was released in 2009 by Nacional Records, a prominent Latin label that did not sign a direct license. But apparently because [REDACTED] was included on the [REDACTED], MRI erroneously attributed all plays of the song during April 2012 to [REDACTED].

Cleopatra Records. As noted earlier labels such as Cleopatra Records that specialize in re-records are particularly susceptible to having their play share inflated by MRI's errors. Sirius XM frequently trumpeted its direct license with Cleopatra Records in its direct case, including specifically the band L.A. Guns. *See, e.g.,* Noll WDT at p. 42; Gertz WDT at p. 14; 6/6/2012 Tr. 686:15-16 (Frear). As SoundExchange pointed out during the direct phase hearing, in August 2011 while Sirius XM often played L.A. Guns songs, it never once played any of Cleopatra-owned L.A. Guns re-records. 6/7/2012 Tr. 1012:1-9 (Blatter). That practice apparently did not stop because according to the original Sirius XM playlist, [REDACTED] [REDACTED]. But in MRI's "cleaned" April 2012 playlist, [REDACTED] [REDACTED] [REDACTED] [REDACTED]. Indeed, MRI repeatedly transferred ownership of original albums and performances to Cleopatra records based on Cleopatra re-records, compilations, or live albums that Sirius XM did not play according to Sirius XM's playlist. These include, for example:

- [REDACTED]: 401 plays erroneously reassigned from the original label owners to Cleopatra based on various tribute and compilation albums released by Cleopatra Records, none of which appear on Sirius XM's April 2012 playlist. Instead, the versions played are from albums owned by other labels, especially [REDACTED].
- [REDACTED]: 131 plays erroneously reassigned from the original label owner to Cleopatra based on live recordings from the album "[REDACTED]." According to Sirius XM's April 2012 playlist, however, Sirius XM played only versions of those songs owned by other labels (almost entirely from the original album "[REDACTED]", released in 1992 by [REDACTED]).
- [REDACTED]: 132 plays erroneously reassigned from the original label owners to Cleopatra based on tracks of the same title on various compilation albums that do not appears on Sirius XM's April 2012 playlist.

See Exhibit L (MRI-cleaned playlist); Exhibit M (original playlist). Again, this list represents only a fraction of the artists with recordings erroneously assigned by MRI to Cleopatra Records.

But the erroneously assigned recording for just these four artists alone account for over 1/3 of the plays assigned to Cleopatra Records on the MRI "cleaned" playlist. Yet again, this explains how Cleopatra's play share jumped five-fold from the original study to the current study: MRI simply awarded Cleopatra records ownership of thousands of plays that it does not own.

K-Tel Music, Inc. As noted earlier, K-Tel Music is a larger purveyor of compilation albums. Because compilation albums often contain sound recordings that the releasing label (such as K-Tel) does not own, one must verify whether the releasing label even has rights to license particular tracks on the compilation. But rather than undergoing such an analysis, MRI effectively did the opposite: it awarded every version of any sound recording appearing on a compilation album to the releasing label. This had a particularly large inflating effect for K-Tel, where MRI appears to have assigned well over a thousand plays to K-Tel for recordings that do not even appear on K-Tel albums. A manual review of a sample of 1,000 recordings assigned by MRI to K-Tel against K-Tel's metadata (SXM_CRB_REB_00020382-87) and publicly available sources regarding recording ownership shows that under 50% of the recordings assigned to K-Tel were even on albums released by K-Tel (according to its own metadata). The remainder of these plays were recordings with the same artist name and track title as recordings on K-Tel compilations albums, but the version played by Sirius XM was not from K-Tel's album. These include for example:

- [REDACTED]
- [REDACTED]
- [REDACTED]

See Exhibit N (MRI-cleaned playlist); Exhibit O (original playlist). Again, the methodology employed by MRI, matching artist name and track name, simply does not work for labels that issue compilation albums. As a result, the MRI play share data for K-Tel is vastly inflated.

Though these examples alone encompass well over 5,000 erroneously assigned plays, they represent only a tiny fraction of the errors introduced by MRI because of a faulty matching methodology. That methodology of matching plays based on artist name and track title (with respect to direct license labels only) is so flawed as to make the entire Play Share Study entirely unreliable. This methodology has caused MRI to vastly overstate the play share and ranking for direct license labels by erroneously transferring ownership of thousands of sound recordings from non-direct license labels to direct license labels.

Unreliable and incorrect testimony should not be admitted into evidence, and SoundExchange therefore respectfully requests that this analysis be excluded.

B. Mr. Gertz Was Unable to Explain the Errors in the Play Share Analysis.

In addition, this Court should exclude the Play Share Analysis because it has been offered by a fact witness who lacks sufficient personal knowledge to establish that the analysis is reliable or to explain its errors.⁸ Although Mr. Gertz acknowledged that he had reviewed

⁸ Mr. Gertz also appeared to contradict his written rebuttal testimony with respect to basic facts about the analysis. Although his written rebuttal testimony plainly states that the Play Share Analysis “represents the label share of all plays *across all services* covered by the Sirius XM direct licenses” Gertz WRT at 5 n.5 (emphasis added), Mr. Gertz gave inconsistent answers at his deposition about whether even this most basic fact – the basis for the market share that MRI calculated – is true. [REDACTED]

SoundExchange's prior motion that had raised the problems with MRI's analysis, and [REDACTED]

[REDACTED], see *id.* 75:8, Mr. Gertz failed to offer any explanation for the systematic errors demonstrated above, even when presented with exhibits providing examples of such errors. See, e.g., *id.* 84:8-85:16.

A fact witness should not be permitted to sponsor testimony in evidence that is replete with errors and thus unreliable, especially where he cannot account for the errors.

CONCLUSION

For the foregoing reasons, the Play Share Analysis should be excluded from evidence.

Respectfully submitted,

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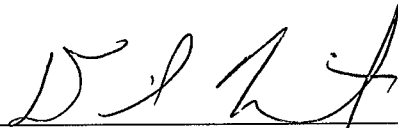
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August 14, 2012

CERTIFICATE OF SERVICE

I, David Moskowitz, do hereby certify that copies of the foregoing were sent via electronic mail and First Class mail on the 14th day of August 2012, to the following:

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David Moskowitz

EXHIBITS A-O

**(RESTRICTED – Subject to Protective Order
in Docket No. 2011-1 CRB PSS/Satellite II)**